

Chapter-4 : PESA Act 1996 and Orissa's Compliance (?)

Orissa's Tribal Demography:

Orissa occupies a unique position among the Indian States and Union Territories for having a rich and colourful tribal scenario. Majority of Scheduled Tribes live in hilly and forest regions. Their economy is largely subsistence oriented, non-stratified and non-specialized. Their social system is simple and aspirations and needs are not many. Though the Scheduled Tribes in Orissa have suffered from social, educational and economic backwardness due to geo-historical reasons, they have their own distinctiveness and social-cultural milieu. There are as many as 74 dialects spoken by 62 Scheduled Tribes in Orissa. Their ethos, ideology, worldview, value-orientations and cultural heritage are rich and varied. At one end of the scale there are nomadic food gatherers and hunters and at the other end, skilled settled agriculturists and horticulturists. The tribal areas of Orissa, therefore, present an extremely diverse socio-economic panorama.

District-wise Tracts in Scheduled Areas of Orissa

District	Tracts included in Scheduled Area	Area (in Sq. Kms.)
1. Mayurbhanj	Whole District	10,416.60
2. Balasore	Nilagiri Block	223.60
3. Keonjhar	Keonjhar Tahsil	5,350.20
	Champua Tahsil	1,585.40
4. Sambalpur	Kuchinda Tahsil	2,367.30
5. Sundergarh	Whole District	9,921.40
6. Gajapati	R. Udayagiri	2,498.80
7. Ganjam	Sorada Tahsil	912.00
8. Kalahandi	Th. Rampur Block	323.80
	Lanjigarh Block	999.70
9. Koraput	Whole District	8,534.00
10. Rayagada	Whole District	7,584.70
11. Nawrangpur	Whole District	5,135.30
12. Malkanagiri	Whole District	6,115.30
13. Phulbani	Kandhmal Tahsil	2,017.60
	Baliguda Tahsil	5,628.10
Total		69,613.80 (44.70)
State Total		1,55,707.00

Source: Economic Survey 1995-96, Government of Orissa

According to 2001 Census, the tribal population of the State is 81,45,081 constituting 22.13% of the total population of the State and 9.66% of the total tribal population of our country. There are 62 tribal communities including 13 Primitive Tribal Groups (PTGs) in the State. Orissa has the third largest concentration of tribal population in the country. About 44.70% of the State's geographical area which is known as Scheduled Area, extends over 118 out of 314 Blocks in 12 districts and covers Scheduled Tribe population of 55,46,081. This accounts for about 68.09% of the total tribal population

of the State. The remaining tribal population lives in MADA/Cluster pockets and is dispersed in other areas that are covered under the Dispersed Tribal Development Programme (DTDP). The rate of literacy among the Scheduled Tribes is 37.37% against the overall literacy rate of 63.08% of the State as per 2001 census. The tribal male and female literacy rates are 51.48% and 23.37% respectively. Over the last decade, there has been a significant improvement in literacy level among the STs in the State, which recorded an increase from 22.31% in 1991 to 37.37% in 2001.

From the above account the critical significance of PESA for the State of Orissa is easily discernible. It is therefore essential to ascertain how the State of Orissa has complied with various mandates of PESA. It is a fact that the State of Orissa enacted amendment to its 3 major Panchayat Laws, namely Orissa Grama Panchayat Act 1964, Orissa Panchayat Samiti Act 1959 and Orissa Zilla Parishad Act 1991 within one year of notification of Panchayat Extension to Scheduled Areas Act 1997, as enjoined under Section 5 of the latter. The PESA Act was notified on 24th December 1996, and the Orissa's compliant amendments were enforced w.e.f. 22nd December 1997. Thus, in a legal sense, Orissa carried out the directive of PESA Act, 1996 as if honoring the overriding powers of the Central law. But the crux of the matter is how far the Orissa Amendments translated the letter and spirit of PESA into statutory provisions. To answer this all important question, we need to grasp the implications of the major amendments so carried out by the Government of Orissa vis-à-vis PESA Act 1996.

1. Orissa Amendments in respect of reservation of seats for STs in Panchayats:

The PESA Act vide Section-4 (g & h) provides for the special manner in which reservation of seats for STs in Panchayats at every level, Grama Panchayat, Panchayat Samiti and Zilla Parishad shall be made in Scheduled Areas. It mandates that in every tier of Panchayatiraj in a Scheduled Area, "reservation for the Scheduled Tribes shall not be less than one half of the total number of seats", "all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes", and "the State Government may nominate persons belonging to such Scheduled Tribes as have no representation in the Panchayat at the intermediate level or at the district level" subject to maximum one-tenth of the total members elected. The Orissa Amendments of 1997 have partially complied with the above mandate. For instance, the insertion of a proviso to Section 10(3-a) of OGP Act complies with PESA's direction to reserve 'not less than one half of the total number of seats' in a Grama Panchayat falling under the Scheduled Areas, but PESA's direction to reserve the seat of Chairperson of a Panchayat for persons belonging to STs hasn't been complied with, since the previous provision of election of Sarpanch of the GP remains unaltered as before. The same instance of half-hearted compliance is also noticed so far constitution of Panchayat Samiti is concerned. By the Amendment of 1997, Orissa Panchayat Samiti Act 1959 was amended by way of insertion of a proviso to Section 16(2-a) that provided for reservation of 'not less than one half of the total number of seats' in a Panchayat Samiti falling under the Scheduled Areas, but no amendment was made to ensure that the seat of Chairperson of the Samiti shall go to a person of ST. Orissa Zilla Parishad Act 1991 was also amended in a similarly half-hearted manner. While the 1997 Amendment inserted a proviso to Section 6(3-a) of the Act of 1991 complied with the PESA's mandate for reserving 'not less than one half of the total number of seats' for STs, it shied away from giving effect to the another direction of PESA i.e. the seat of Chairperson must go to a person belonging to ST.

2. Amendment to Section-1 of OGP Act 1964 relating to jurisdiction:

Earlier to the Amendment, Section 1(4) of OGP Act 1964 read, "*Nothing in this Act shall apply to the Scheduled Areas referred to in Clause (1) of Article 244 of the Constitution*". It was altogether omitted by the Amendment of 1997, implying that whatever is contained in the OGP Act following the compliance amendments of 1997 shall henceforth apply in-extenso to the Scheduled Areas. Did this Amendment bring the above Panchayat law of Orissa nearer PESA? Not at all, because the sole intention of PESA is to set up and institutionalize a separate system of governance, rather self-governance, for the tribal communities in Scheduled Areas, where the corpus of the laws along with the corresponding administrative machinery as existing in mainstream, non-scheduled non-tribal areas would have little relevance. The overall objective of the Fifth Schedule of the Constitution also forbids the application mutatis mutandis of the laws meant for the mainstream, non-scheduled areas to the Scheduled Areas. As per Clause(5) of the Fifth Schedule the Governor of the concerned State has the power to forestall the extension of any law or extend it with such modifications and exceptions as are necessary along with his power to notify any specific regulation for the peace and good of a Scheduled Area. In keeping with such Constitutional mandate the pre-Amendment OGP Act had purportedly kept its jurisdiction off from the Scheduled Areas. As irony would have it, the above amendment, though effected in the name of compliance to PESA, ran directly counter to the basic mandate of PESA apart from a naked violation of Fifth Schedule of the Constitution.

3. Amendment to Section-3 of OGP Act 1964 relating to Definition of Grama (Village):

In respect of a Village in a Scheduled Area, the Section 4(b) of PESA Act laid down as follows: "*a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs*". But Section-3 (Constitution of Grama) of OGP Act was amended by way of insertion of a Proviso to the Explanation, which read, "*Provided that in the Scheduled Areas, a*

Grama shall ordinarily consist of a habitation or group of habitations, a hamlet or a group of hamlets comprising a community or communities and managing its affairs in accordance with traditions and customs". Superficially, there is no difference between these two definitions except the inclusion of the words "or communities" in the amendment definition. However, on a close scrutiny, one can make out a hell and heaven difference due to the addition of a single word 'communities'. Usually, a village or hamlet in a Scheduled Area is a habitation used by a single tribal community, whose traditions and customs command acceptance and authority since remote past in that habitation. In contrast, a village or hamlet in the mainstream, non-scheduled area is inhabited by several communities including settlers from outside, who may be divided on the basis of religious, caste and ethnic lines. In sum, a village in scheduled area is a homogenous formation, while a village in the non-scheduled area is usually heterogeneous or diverse one. Allowing several communities to reside in a Scheduled Area village has in the past resulted in the exploitation of the tribal community by the non-tribal groups and consequent conflicts and disturbance of peace and harmony in the village and surrounding areas, often to the detriment of the tribal community. Moreover, that the tribal persons, because of their innocence and lack of exposure, can fall easy prey to the swindlers from other communities, is an established sociological and anthropological finding and that is why there are protective legislations in place like prohibiting transfer of tribal land to a non-tribal and restricting money-lending by a non-tribal to tribal. It is out of this consideration that PESA has defined a village or a hamlet to be a homogenous community. Thus the redefined village of the amended OGP Act is at odds with PESA definition of the village.

The Section 3(2) of OGP Act, which authorizes the State Government to "*alter the area comprised in a Grama by reducing or adding to the number of villages comprised within such Grama*" is also at variance with the above mentioned PESA definition of village, in which already the habitation of a tribal community supposedly pre-exists out there, and the Government is supposed to merely recognize and legitimize its existence, and never be allowed to alter its size or boundaries by a decision taken above, ignoring the nature of habitation and its living inhabitants.

4. Amendment of Section 5 of OGP Act (Grama Sabha and its functions):

Pinning absolute faith in the wisdom of Grama Sabha, the Section 4(d) of PESA Act makes an omnibus declaration- "*Every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity community resources and the customary mode of dispute resolution*". This small statement however leaves no aspect of tribal community and their natural and socio-cultural environ outside the all-embracing authority of Grama Sabha, the inventory and epitome of collective wisdom. But Orissa amendment inserts a new provision i.e. Clause-6 in the Section-5 of OGP Act that completely takes away glow of an all powerful Grama Sabha as envisaged by PESA and renders it into a subservient tool of all the authorities placed atop. The newly inserted Clause while quoting the above mentioned statement about the omnipotence of Grama Sasan adds the following qualification to it- ". . . *consistent with relevant laws in force and in harmony with basic tenets of the Constitution and human rights*". Needless to say, there are still archaic colonial and colonial style laws in force like Land Acquisition Act 1894, Indian Forest Act 1927, Indian Police Act 1860, Indian Registration Act 1908, Mines and Minerals (Development and Regulation) Act, 1957 and Forest Conservation Act 1980, which rule the roost in scheduled areas engendering alienation, disaffection and discontent of the tribal communities on an ever increasing scale vis-à-vis the State and its plethora of institutions. So far basic tenets of Constitution are concerned, those are open to multiple and often contradictory interpretations. For instance, Article 19(1) guarantees every citizen inter alia such fundamental rights as to move freely and to reside and settle in any part of the territory of India and also to practise any profession, or to carry on any occupation, trade or business, which may not prove beneficial to the tribal communities living in the Scheduled Areas. Again, in absence of a universally accepted definition of 'the human rights', these are also subject to equivocation and abuse. By adding superfluously such qualifying standards, the Orissa amendment has belittled the all-round competence of Grama Sabha in a Scheduled Area to safeguard and preserve the glory and grandeur of multifaceted tribal society and its nature-gifted environ.

5. Insertion of Clause (6) under Section-5 of OGP Act visa-a-vis PESA's thrust on 'customary mode of dispute resolution'

As already mentioned, Section 4(d) of PESA Act enjoins upon the State legislature to declare Gram Sabha to be competent inter alia '*to safeguard and preserve . . . the customary mode of dispute resolution*' along with traditions and customs of the people, their cultural identity and community resources. The Clause (6), which was inserted into Section-5 says inter alia, "*In Scheduled Areas, the Grama Sasan shall be competent to safeguard and preserve . . . the customary mode of dispute resolution consistent with the relevant laws in force and in harmony with basic tenets of the Constitution and human rights*". Firstly, this Orissa amendment talks of 'Grama Sasan', not PESA's 'Gram Sabha' to be the competent authority for preserving and safeguarding the customary mode of dispute resolution. As we shall see just now, there is a vast difference between PESA's Gram Sabha and Orissa's Grama Sasan. 'Grama Sasan' as per Section-4 of OGP Act is a body corporate to be known by the name of the concerned Grama and to be composed of all persons registered in the electoral roll for the concerned Assembly Constituency. A Grama Sasan shall have perpetual succession, a common seal, and power to acquire, hold and dispose property, to enter into contracts and to sue and be sued by its name. But Grama Sabha is however defined as the 'meeting of Grama Sasan' as per Section-5(2). Thus Grama Sabha

being an assembly of the adult persons of a village has a concrete and tangible shape of its own, whereas Grama Sasan is only a juridical entity having no corporeal existence. Moreover, depending on the nature of the case, Grama Sasan may be variously represented by Grama Sabha, Grama Panchayat, Sarpanch or even Secretary/ Executive Officer. Thus, to say that Grama Sasan is competent in any matter carries no practical significance, but the mention of Grama Sabha in its place does. Secondly, supposing for argument's sake that Grama Sasan and Grama Sabha are co-terminus and interchangeable, the addition of such qualifying conditions attached to the competence of Grama Sasan/ Grama Sabha as "*consistent with the relevant laws in force and in harmony with basic tenets of the Constitution and human rights*" renders the provision ambiguous and nebulous defying any determinate interpretation. Thirdly, if the State legislature would have been sincere in giving effect to PESA's thrust on Grama Sabha's competence in respect of preserving and safeguarding 'the customary mode of dispute resolution', it would have revived, at least for the purposes of Scheduled Areas, the *Section-154 (Savings in respect of Panchayat Police and Adalti Panchayat) of OGP Act 1964*, which has remained ever since defunct in absence of any Rules framed there-under. Thus the State legislature of Orissa, by way of insertion of the above mentioned Clause (6) under Section-5 as a part of its PESA-compliant amendment, has merely paid a lip service to the PESA's direction on Grama Sabha's competence to put in place the customary mode of dispute resolution.

6. Amendment to Section 5(3) of OGP Act (Grama Sabha and its functions):

The Section 4(e) of PESA Act categorically states, "*every Gram Sabha shall- (i) approve the plan, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level; and (ii) be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes*". But the amendment to Section-5 titled 'Grama Sabha and its functions' has inserted the Clause-3 which reads almost similar to the above expression of PESA, except for the replacement of two expressions, namely 'Grama Sabha' in PESA by 'Grama Sasan', and 'poverty alleviation and other programmes' by 'poverty alleviation or similar other programmes'. Firstly, there is a big difference between 'Grama Sabha' meaning the assembly of all the adult members of a village and 'Grama Sasan' meaning the authority of the village, which is exercised through its executing wing Grama Panchayat. Thus going against the thrust of PESA on Grama Sabha, Orissa amendment has virtually empowered the Grama Panchayat, the symbolic representative of Grama Sasan, in respect of both approval of the plans, programmes and projects and identification of beneficiaries.

The next point that arises in connection with this amendment concerns the expression 'poverty alleviation or similar other programmes' used by the amendment in place of 'poverty alleviation and other programmes' of PESA Act. The latter expression is much more spacious and inclusive than the former. The former not only talks of poverty alleviation programmes but any other programme (be it a programme for communal harmony, maintenance of law and order or dispute resolution etc.) as the subject matter of approval by Grama Sabha, while the latter limits it to only programmes in the nature of poverty alleviation.

7. Further Amendment to Section 5(3) of OGP Act (Grama Sabha and its functions):

The Section 4(f) of PESA Act mandates that "*every Panchayat at the village level shall be required to obtain from the Grama Sabha a certification of utilization of funds by that Panchayat for the plans, programmes and projects referred to in clause (e)*". But a proviso added to the amended Section 5(3) of OGP Act requires the Gram Panchayat to obtain the certification of utilization of funds by that Panchayat from Grama Sasan, not from Grama Sabha as mandated by PESA. As already mentioned, Grama Sasan is virtually the Grama Panchayat itself. Thus the amendment has given rise to a situation of absurdity par excellence i.e. the funds utilizing agency shall certify the utilization of the funds. Thus the above amendment has not only ignored PESA's trust in Grama Sabha as the supreme certifying authority in the matter of utilization of funds, but also has opened the floodgate of corruption and misappropriation of public money by a shrewd coterie of GP functionaries masquerading as the flag-bearers of Grama Sasan.

8. Amendment to Section-44 of OGP Act (Obligatory Functions):

The Section -4(m) enjoined on the legislature of a State thus- "*While endowing Panchayat in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Grama Sabha are endowed specially with- (i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant; (ii) the ownership of minor forest produce; (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe; (iv) the power to manage village markets by whatever name called; (v) the power to exercise control over money lending to the Scheduled Tribes; (v) the power to exercise control over institutions and functionaries in all social sectors; (vi) the power to exercise control over local plans and resources for such plans including tribal sub plans*".

But a new provision was added under Section 44 of OGP Act i.e. Clause (2), which omitted reference to Grama Sabha altogether and instead half-heartedly endowed the Grama Panchayat with the powers in respect of all the subjects mentioned above except two crucial ones i.e. the power to prevent land alienation and ensure restoration of land, and the

power to manage village markets, and that too in a severely qualified manner. It requires Grama Panchayat, subject to the control and supervision of the Grama Sasan, to “*exercise within its local limits such power and perform such functions in such manner and to such extent as may be prescribed. . .*”. As already shown, in the context of OGP Act, Grama Sasan and Grama Panchayat are, for all practical purposes, one and the same authority. Again, the manner in which the Grama Panchayat shall exercise its powers and functions has not been statutorily laid down, but left to the discretion of the rule-making administration in future. Under such circumstances of uncertainty and indecision that are bound to unfold, it is the upper caucus of bureaucratic hierarchy who shall exercise all the powers de facto in respect of various subjects while making only a cosmetic reference to Grama Panchayat as the executants of every dispensation.

9. Amendment to Bihar and Orissa Excise Act 1915 in respect of Scheduled Areas:

The above apprehension has already been borne out to be true at ground level. For instance, Bihar and Orissa Excise Act 1915 was amended in 1999 (Act 2 of 1999) by inserting Section 26-A, whereby it was provided that in a Scheduled Area no license or exclusive privilege for manufacture or sale of intoxicant shall be granted “*except with the prior approval of concerned Grama Panchayat accorded with the concurrence of Grama Sasan*”. Apart from the disconcerting fact that there is no mention of Gram Sabha’s role in this crucial matter, there is a strong qualifying provision put in place to circumscribe the authority of Grama Panchayat. It says if the Grama Panchayat fails to communicate its decision to the competent authority within a period of 30 days from the date of receipt of the proposal for licensing a unit for manufacture or sale of intoxicants, “*it shall be deemed that the concerned Grama Panchayat has accorded the required approval*”. Once the unit is so licensed, neither Grama Sabha nor Grama Panchayat nor Grama Sasan can do anything for closure of the unit, even if it is subsequently found to be harming the livelihood, health, peace or morale of the tribal community.

Such an amendment has belied the mandate of PESA Act which in Section 4(m-i) enjoined upon the State legislature shall empower the Grama Sabha and Panchayat at appropriate level to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant in Scheduled areas. As a result of this half-hearted measure, the people in Scheduled Areas of Orissa have fallen easy prey to reckless exploitation of the liquor barons, and neither Grama Sabha nor Grama Panchayat nor Panchayat at higher levels is able to muster the legitimacy to stem the rut.

10. Orissa GP (Minor Forest Produce Administration) Rules 2002:

A similar miscarriage has been done by Government of Orissa to PESA’s direction to empower Grama Sabha along with the Panchayats in respect of ownership of minor forest produce. The Section 44(2) of OGP Act entrusts inter alia ‘the ownership of minor forest produce’ (item- b) to the ‘*Grama Panchayat subject to the control and supervision of the Grama Sasan*’, the Act nowhere explains as to how Grama Sasan, which is itself a nebulous, non-descript formation having iconic value only, shall exercise the ‘control and supervision’ over Grama Panchayat. While the PESA’s insistence on the role of Grama Sabha in the matter has been completely ignored, the confusing situation became more confounded while the Government of Orissa in the Dept. of Panchayati Raj notified the Orissa Grama Panchayat (Minor Forest Produce Administration) Rules, 2002 in Extraordinary Gazette of Orissa (No. 2091 dated Nov. 15, 2002). The said notification was purportedly made to comply with Section 44(1) in respect of control over item ‘(w) minor forest produce’ by the Grama Panchayat, but it was applied to the whole territory of Orissa including the Scheduled Areas. As per the above Rules, any person intending to collect the above mentioned minor forest produce from the primary gatherers or to trade in such produce within the Grama Panchayat during any trading year is required to register himself on payment of such registration fee to the concerned Grama Panchayat, as may be notified by the Government from time to time. But fixation of the minimum price would be done by the Panchayat Samiti in September and would be circulated to different offices of district administration and to all the GPs. The Gram Panchayat may modify the prices so fixed keeping in view the local needs by adopting a resolution to that effect. If Panchayat Samiti fails to fix the price then the District Collector would call a meeting of PS preferably in October to fix up the minimum procurement prices. The registered trader shall furnish monthly and annual returns to the GP who in turn shall submit the annual return to the concerned Forest Range Officer. However, in case of violation of the rules by a trader, the Sarpanch or Secretary of the GP shall lodge complaint before the DFO. The DFO may seize the MFP from the defaulter trader, auction it off publicly and deposit the sale proceeds thereof to the State treasury under the appropriate head of account under the Orissa Forest Act. Thus, it is noticed that not only the role of Grama Sabha doesn’t figure anywhere as against the mandate of PESA, but also the GP’s authority over minor forest produce has been squeezed, diluted and circumvented in very many ways by the sanctioned interference of administrative authorities like Collector, Ranger and DFO.

11. Amendment to Section 59 of OGP Act 1964 in respect of private markets:

The PESA Act 1996 in its Section 4 (m-iv) has mandated the concerned State legislature to endow the Grama Sabha and Panchayats at appropriate level in Scheduled Areas with the power inter alia ‘to manage village markets’. In a purported move to comply with the said mandate, only Section-59 (Private Markets) of OGP Act was amended by way of insertion of a proviso which read, “*Provided that in the Scheduled Areas, the Grama Panchayat, subject to the control and supervision of the Grama Sasan shall have power to manage village markets by whatever name called*”. As already

noted, Grama Sasan literally means the Village Government, the body corporate by the name of the Grama composed of all persons registered in the electoral roll, having perpetual succession and common seal, with power to acquire, hold and dispose of property, to contract and to sue and get sued (Section-4 of OGP Act). However, the term Grama Sasan left to itself and conceived in a stand-alone mode, won't carry any tangible meaning, unless it is represented its assembly which is called Grama Sabha or its executive, which is called Grama Panchayat. Without specifying the wing of the Grama Sasan (Grama Sabha or Grama Panchayat) which is to exercise control and supervision, the reference to Grama Sasan is bound to create confusion. Since the above amendment doesn't tell which wing of Grama Sasan is to exercise control and supervision, the power to manage village markets would virtually rest with Grama Panchayat. Thus PESA's mandate for sharing the power over management of village markets by the Grama Sabha has been completely sidelined by the Orissa amendment as mentioned above.

12. Amendment 2001 of Orissa (Scheduled Areas) Money-lenders' Regulation 1967:

As regards PESA's direction in Section-4(m-v) to amend the existing laws to empower Panchayats and Gram Sabhas in Scheduled Areas to control money-lending to the Scheduled Tribes, Government of Orissa carried out merely a cosmetic exercise, that has little impact on the ground. It is worthwhile to mention here that there existed a few instruments of law on the subject in Orissa even prior to enactment of PESA. These are Orissa Money-lenders' Act 1939, Orissa Money-lenders' Rules 1987, Orissa (Scheduled Areas) Money-lenders' Regulation 1967 and Orissa (Scheduled Areas) Money-lenders' Rules 1970. But Government of Orissa amended only Orissa (Scheduled Areas) Money-lenders' Regulation 1967 in 2000 (Regulation 1 of 2001) by way of incorporating a few minor changes, in the name of conformity to PESA. As per a new provision (Section 7-A) inserted into the said regulation, no money-lender shall advance loan to a scheduled tribe, except on the prior recommendation of the concerned Grama Panchayat accorded with the concurrence of the Grama Sasan. A money-lender before advancing a loan to an ST person shall send the proposal thereof to the Grama Panchayat for its recommendation which shall be communicated within a period of 45 days from the date of the receipt of the proposal. If no communication is made within the stipulated period, it shall be deemed that there is no objection of the GP to the said proposal. If the GP decides to refuse the proposal, it shall give the reasons in writing thereof to the money-lender. In case where a loan is advanced in contravention of the GP's recommendation, the debtor shall not be liable to repay the loan amount or any interest thereon and the money-lender shall discharge every mortgage, restore every pledge, return every note and cancel or reassign every assignment given by the debtor as security for such loan.

As per the amended Section-9 (1) of the above Regulation, every money-lender shall deliver an annual statement of accounts to his debtor and as well to the concerned Grama Panchayat in case where the debtor is an ST person. Then Section 9(5) says that if the concerned ST debtor is not satisfied with the veracity of the statement so furnished by the money-lender, he may bring the matter to the notice of the concerned GP, which shall enquire into the matter and if satisfied about the genuineness of the complaint may direct the licensing authority for appropriate action against the money-lender. On receipt of the above direction, the licensing authority shall hold a fresh enquiry and if necessary take appropriate steps for correction of the faulty entries and for recovery of the excess amount if paid by the debtor, from the money-lender. If the entries are found to be genuine, the licensing authority shall intimate the details of his finding to the GP within sixty days of the receipt of the direction.

Then again, the Section-11 (Procedure in suits regarding loans) says that the Court before deciding the claim on merits shall frame the issue taking into account whether the case related to the money-lending to an ST person.

It is now clear that the above amendment has not given any power to Grama Sabha in the matter of money-lending operations in Scheduled Areas, as against the mandate of the PESA Act. It has given only some advisory powers to Grama Panchayat. Moreover, an aggrieved ST debtor has to finally depend upon the mainstream judiciary for redressal of his complaint, whereas he can't access it because of its expensive, time consuming and complicated procedure. Taking the cue from PESA, the Government of Orissa could have taken the appropriate steps for amending the existing Act, Rules and Regulations relating to money lending so as to empower the Grama Sabha and Panchayats to play their decisive role in regulating the exploitative money-lending operations in the Scheduled Areas. In absence of such compliance amendments, the problem of exploitation and deprivation of the tribal persons by the unscrupulous money-lenders grew from bad to worse in the Scheduled Areas.

13. Amendment of 2002 to Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation 1956:

As a part of the duty cast on the Governor under Clause-2(a) of Fifth Schedule of the Constitution to '*prohibit or restrict the transfer of land by or among the members of the Scheduled Tribes*' the Governor Orissa had promulgated the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation 1956. This Regulation however entrusted the implementation of its provisions on the Revenue administration of the State, especially Sub-Collector, District Collector and Revenue Divisional Commissioner on one hand, and on the Executive Magistrate having the powers of a Judicial Magistrate for trying the offenses on the other. But the PESA Act 1996 vide Section 4(m-iii)

enjoined upon the concerned State legislature to endow the Panchayats at appropriate level along with Grama Sabha with the 'power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe'.

In an effort to comply with PESA's directive, the said Regulation was amended in 2000 and that amendment came into force w.e.f. 4th September 2002. As a result of the amendment, certain new provisions were made in the Regulation. Firstly, any transfer of immovable property by a member of Scheduled Tribe shall be absolutely null and void, except under two circumstances, namely if the concerned property was mortgaged to a public financial institution for securing a loan, and if the transfer of the concerned property was made to another member of the Scheduled Tribe vide Clause 3(1). Secondly, a member of ST shall not transfer any land if the total extent of his land remaining after the transfer will be reduced to less than two acres of irrigated land and less than five acres of un-irrigated land vide Clause 3(1-iii). Thirdly, the competent authority (Collector) may, on an information received from a Grama Panchayat about a case of illegal transfer, order ejection against the illegal possessor of the property and restoration of such property to the transferor or his heirs vide Clause 3(2). Fourthly, on finalisation of the proceedings of a case, the competent authority shall make a report to the concerned GP about such orders of ejection or restoration vide Clause 3A(3). Fifthly, if any person is found to be still continuing to illegally occupy the concerned immovable property belonging to a Scheduled Tribe, he shall be punishable with rigorous imprisonment or fine or both depending upon the nature of contravention vide Clause 7.

On a close scrutiny of the above provisions of the Amendment of 2002, it is noticed that Grama Sabha has not been given any power in the matter of prevention of alienation of tribal land or restoration of the alienated land to the concerned Scheduled Tribe. Besides the Grama Panchayat has also not been given any powers worth the name except its right to inform the competent authority and get informed by him in the matter involving the alienation or restoration of tribal land. As a matter of fact, all the real powers executive and adjudicative have remained vested with the high revenue officials and executive magistrate as before. Thus the above amendment falls far short of the mandate of PESA for empowering both Grama Sabha and Panchayats at appropriate level to prevent alienation of tribal land and ensure restoration of alienated land to the tribal person in Scheduled Areas.

14. Amendment to Section-3 of Orissa Zilla Parishad Act 1991 (in respect of minor minerals, land acquisition and water bodies):

The relevant clauses under Sections -4 of PESA Act state the following:

- “(i) the Gram Sabha or the Panchayat at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas . . . ;*
- (j) planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;*
- (k) the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting license or mining lease for minor minerals in the Scheduled Areas;*
- (l) the prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction”.*

But Orissa amendment without endowing any power to Grama Sabha entrusted the same to Zilla Parishad. The Section-3 of Orissa Zilla Parishad Act 1991 was amended and a new provision inserted therein such as Clause-6 to that effect. It stated as follows,

“Notwithstanding anything to the contrary in this Act or in any other law for the time being in force, in the Scheduled Areas;

- a) no prospecting license or mining lease for minor minerals or concession for the exploitation of minor minerals by action shall be granted under any law on or after the commencement of the Orissa Zilla Parishad (Amendment) Act 1997, except with the prior recommendation of the Parishad;*
- b) no acquisition of land development projects and for resetting or rehabilitating persons affected by such projects shall be made under any law without prior consultation with the Parishad; and*
- c) the Parishad shall plan and manage the minor water bodies.”*

Thus very direction of PESA for involving Grama Sabha by way of consultation or otherwise in the process of exploitation of minor minerals, acquisition of land for development projects, formulation of resettlement and rehabilitation plans or management of minor water bodies in the Scheduled Areas was completely shelved by the above amendment to Orissa Zilla Parishad Act 1991, ironically effected in the name of compliance to PESA Act.

As is well known, under the existing laws of both Central and State Governments, such Government officials as Tahsildar, Sub-Collector and District Collector have been assigned sweeping powers in the matters relating to land acquisition, formulation of R&R policies, licensing of extraction of minor minerals and management of minor water

bodies. While no amendment has been made to such long standing Central or State Acts and Rules made there under (for instance, Orissa Minor Mineral Concession Rules 1990) in compliance to PESA, the above amendment made to Orissa Zilla Parishad Act 1991 has legally precluded any role to be played by Grama Sabha in very crucial matters of land, water and forests, which condition and influence the life and livelihood of tribal community in Scheduled Areas.

15. Amendment to Section-20 of Orissa Panchayat Samiti Act 1959 (in respect of control over institutions and functionaries and plans and resources):

The Section 4(m) of PESA inter alia stated that Panchayats at the appropriate level and Grama Sabha shall be vested by the State legislature with *“the power to exercise control over institutions and functionaries in all social sectors”*, along with *“the power to exercise control over local plans and resources for such plans including tribal sub-plans”*. In the name of compliance to this PESA mandate, Section 20 of Orissa Panchayat Samiti Act 1959 was amended and a new provision called Clause (5) was inserted therein. The said Clause (5) completely betrayed the above provision by taking a circuitous and subversive course with the help of jugglery of words. The amendment ran as follows: *“Notwithstanding anything contrary to the nature and Act, in the Scheduled Areas, the Samiti shall, in consultation with the Grama Sasan, be competent- (i) to exercise control and supervision, the nature and extent of which shall be such as may be prescribed, over institutions and functionaries of various social sectors in relation to the programmes and measures, as the Government may, by notification, specify; and (ii) to prepare the local plans including tribal sub-plans for the area and to exercise control over resources for such plans.”*

Firstly, the reference to consultation with Grama Sasan doesn't carry any meaning, since as already noted, Gram Sasan is a nebulous, non-descript entity like Government of Orissa or Government of India. Secondly, there is no evidence to show that Grama Sabha as envisaged by PESA shall share the power of control over the institutions and functionaries in all social sectors or over the plans including tribal sub-plans and resources for such plans. Only Panchayat Samiti has been given a semblance of power of control in respect of preparation of plans and resources for plans. Thirdly this amendment drastically squeezed the PESA's concept of power of control in general by Grama Sabha and Panchayats over all institutions and functionaries in all social sectors by adding such qualifying conditions- *“control and supervision, the nature and extent of which shall be such as may be prescribed”* and *“in relation to the programmes and measures, as the Government may, by notification, specify”*. It means that Gram Sabha or Panchayats can't control any institution or functionary not connected with 'programmes and measures' (such as Police or CRPF), only those institutions and functionaries related to programmes and measures could be brought under the control of Panchayats, which the Government might specify by way of notification in future, and above all the very definition of control shall be provided by the Government in future. As a matter of fact, till date no such notification has been made by the Government, and as such no Grama Sabha or any Panchayat enjoys the control of any sort over the institutions or functionaries in a Scheduled Area. The only visible fall-out of this amendment has been the consolidation of the monopoly by the Block Office (euphemistically called Panchayat Samiti) over plan-making and plan resources and complete submergence of Grama Sabha or Grama Panchayat under its specious ken.

16. PESA induced Orissa Amendments (with reference to PESA's thrust on authority of Grama Sabha):

The Section 4(n) of PESA Act reads as follows: *“The State Legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions of self-government shall contain safeguards to ensure that Panchayats at the higher level don't assure the powers and authority of any Panchayat at the lower level or of the Gram Sabha.”*

In view of the above mandate of PESA, it was expected that the compliance amendments made to Orissa's Panchayat laws would remove the pre-existing overriding powers of the higher Panchayats and authorities over Grama Sabha. But what transpired ultimately was diametrically opposite to the intentions of PESA. As already mentioned, earlier to PESA, the OGP Act with its top-down hierarchical structure along with numerous provisions for control of Panchayats by the bureaucrats at various levels didn't apply to Scheduled Areas, as per its Section-4, perhaps in deference to Fifth Schedule of the Constitution. But the PESA induced amendment of 1997 removed this limitation, resulting in application of OGP Act to the whole territory of Orissa including the Scheduled Areas. Consequently, the whole regime of command and control from above by the bureaucracy over the Gram Panchayats as detailed in Chapter-XI (Control) of the Act came to be legitimized in respect of Gram Panchayats in Scheduled Areas. Moreover, none of the Amendments vested powers and authority to Grama Sabha in Scheduled Areas in recognition of its presumed competence for self-governance in most matters of community life as envisaged under Section 4(d) of PESA Act; rather every such amendment, as already mentioned, brought in new constraints and limitations to the already shrunken authority of Grama Sabha albeit on the excuse of compliance to PESA. Besides, such amendments further perfected and consolidated the pre-existing hierarchical structure of Orissa's 3 tier Panchayati Raj, so much so that no lower Panchayat can perform any function or exercise any power without the prior approval of the higher Panchayat or Panchayats.

17. No amendment of Orissa Zilla Parishad Act (in the direction of Sixth Schedule):

The Section 4(o) of PESA Act had envisaged, “*The State Legislation shall endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district level in the Scheduled Areas*”.

The objective of this provision is to usher in a paradigm shift in the system of governance in Scheduled Areas, in the direction of full scale self-governance as applied to Sixth Schedule areas in the States of Assam, Meghalaya, Tripura and Mizoram. The Sixth Schedule areas called Tribal Areas are governed by elected autonomous bodies called District Councils, which have both executive and legislative powers, unlike the District Administration in the rest of the country including Fifth Schedule Areas where the District administration is merely an executive agency. The PESA Act sought to endow legislative powers to Zilla Parishad in Scheduled Areas so that the tribal populations won't have to look forward to district State Governments for necessary legal-administrative reforms. But, while making compliance amendment to Orissa Zilla Parishad Act, 1991 the Government of Orissa did nothing of the sort in the above direction.

State of compliance by Orissa amendment vis-à-vis mandate of PESA Act

Sl	Issue/Power	Mandate of PESA	Compliance by Orissa
1.	Jurisdiction of the Panchayat laws	Separate law for the Scheduled Areas so as to ensure the safeguards and transition towards 6th Schedule. Cl.4 (n&o)	No separate law for Scheduled Areas. Existing legislations with amendment apply to these areas.
2.	Definition of Grama (Village)	A homogenous formation comprising the habitation/s of a single community managing its affairs by traditions and customs. Cl.4(b)	A heterogeneous formation comprising the habitation/s of a single community or several communities managing their affairs by traditions and customs. (Section-3 of OGP Act 1964)
3.	Competence of Grama Sabha	Competence of Grama Sabha to protect traditions and customs, cultural identity, community resources and customary modes of dispute resolution. Cl. 4(d)	Grama Sasan's competence has been recognized, but such recognition has been nullified by a spacious reference to laws in force, tenets of Constitution and human rights, not defined in the OGP Act. {Section-5(6) of OGP Act 1964}
4.	Competence of Grama Sabha in respect of customary mode of dispute resolution	Competence of Grama Sabha to preserve and safeguard customary modes of dispute resolution. Cl. 4(d)	Grama Sasan's competence has been recognized, but such recognition has been nullified by a spacious reference to laws in force, tenets of Constitution and human rights, not defined in the OGP Act. {Section-5(6) of OGP Act 1964} . Moreover, Section 125 (Panchayat Police & Adalti Panchayat) of OGP Act remains defunct as ever before due to absence of any effectuating Rules.
5.	Reservation of Seats in Panchayat bodies for STs	Reservation of seats at each Panchayat for STs not less than half, all posts of Chairpersons to go to STs and nomination of members from non-represented communities upto 1/10 th of total in Block & Zilla Panchayats Cl.4(g & h)	Half-hearted compliance by Orissa in respect of its 3 Panchayat laws. While 'not less than half' condition has been complied with, the other two conditions remain unaddressed. Amendments to Section-10 of OGP Act 1964, Section-16 of Orissa Panchayat Samiti Act 1959 and Section-6 of Orissa Zilla Parishad Act 1991)
6.	Prohibition/restriction/regulation of intoxicants	Gram Sabha and Panchayats at appropriate level. Cl 4(m-i)	Limited Power of recommendation vested with Grama Panchayat {Section 44(2) of OGP Act 1964 & Section 26-A of Bihar & Orissa Excise Act 1915}
7.	Ownership over MFPs	Gram Sabha and Panchayats at appropriate level. Cl 4(m-ii)	Limited Power vested with Grama Panchayat {Section 44(2) of OGP Act 1964 and Orissa GP (MFP Administration) Rules 2002}
8.	Preventing alienation & restoring to STs the alienated land	Gram Sabha and Panchayats at appropriate level. Cl 4(m-iii)	Limited Power in respect of information sharing vested to Gram Panchayat {Section 44(2) of OGP Act 1964 and Amendment 2002 to OSATIP Regulation 1956}

9.	Management of village markets	Gram Sabha and Panchayats at appropriate level. <i>CI 4(m-iv)</i>	Power vested to Gram Panchayat (<i>Section 59 of OGP Act 1964</i>)
10	Control over the money lending	Gram Sabha and Panchayats at appropriate level. <i>CI 4(m-v)</i>	Limited Power vested to Gram Panchayat { <i>Section-44(2) of OGP Act 1964 & Amendment 2000 to Orissa (SA) Money-lenders Regulation 1967</i> }
11	Control over the institutions and functionaries in all Social sectors.	Gram Sabha and Panchayats at appropriate level. <i>CI 4(m-vi)</i>	Power vested to Panchayat Samiti (<i>Section 20 of Orissa Panchayat Samiti Act 1959</i>)
12	To prepare the local plans including tribal sub-plans and to exercise control over the resources for such plans.	Gram Sabha and Panchayats at appropriate level. <i>CI 4(m-vii)</i>	Power vested to Panchayat Samiti (<i>Section 20 of Orissa Panchayat Samiti Act 1959</i>)
13	Land acquisition and resettlement and rehabilitation	Prior consultation with Gram Sabha or Panchayats at appropriate level but actual planning & implementation at State level. <i>CI 4-i</i>	Power vested to Zilla Parishad (<i>Section-3 of Orissa Zilla Parishad Act 1991</i>)
14	Planning and Management of minor water bodies.	Panchayats at appropriate level. <i>CI. 4-j</i>	Power vested to Zilla Parishad (<i>Section-3 of Orissa Zilla Parishad Act 1991</i>)
15	Grant of prospecting license or mining lease for minor minerals	Mandatory Recommendations of Gram Sabha or the Panchayats at appropriate level <i>CI 4-k</i>	Power vested to Zilla Parishad (<i>Section-3 of Orissa Zilla Parishad Act 1991</i>)
16	Grant of concession for exploitation of minor minerals or collection these minerals by auction	Mandatory prior recommendations of the Gram Sabha or Panchayats at appropriate level <i>CI.4-l</i>	Power vested to Zilla Parishad (<i>Section-3 of Orissa Zilla Parishad Act 1991</i>)
17	Legislative move in the direction of Sixth Schedule	State legislature to set up administrative arrangements at District level in line with Sixth Schedule of the Constitution <i>CI.4(o)</i>	No amendment of Orissa Zilla Parishad Act 1991 has been made for the said purpose.
18	PESA compliant Amendment to all Central and State laws bearing on Panchayats	All laws Central and State bearing on Panchayats, but inconsistent with PESA to be amended within 1 year of its enactment <i>CI.5</i>	Only cosmetic amendments made by Orissa like other States, while no specific legislative move yet undertaken by the Centre in compliance to PESA

Miscellaneous Legislations relevant to Scheduled Areas

There are also a few other Acts and Policy adopted by Government of Orissa relevant to the Scheduled Tribes living in and outside the Scheduled Areas. These are as follows:

The Orissa Land Reforms Act, 1960 (Sections 22 and 23) applies to the ST population living in and outside the Scheduled Areas and protects them from land alienation. No tribal land can be transferred to a person not belonging to the same community without the written permission of the Revenue Officer. In the event of violation of this provision, the land owner to whom the land has been illegally transferred, shall be subject to a penalty of Rs.200/- (Rupees two hundred) per acre of the land so transferred per year during the period of possession of the transferred land by the landlord.

The Orissa Debt Relief Act, 1980 provides relief to all indigent debtors including such persons as may belong to the classes of small farmers, rural artisans and agricultural labourers. As per this Act all loans contracted by such indigent debtors before the commencement of the Act shall be deemed to have been wholly discharged. The properties pledged by an eligible debtor shall be released in favour of the debtor forthwith. The STs of Orissa, who suffer from persistent indebtedness and allied miseries are eligible to avail the above relief. The Civil Courts have been barred from entertaining

any suit or proceedings in debt recovery. For this purpose, Sub-Collectors and Tahsildars have been empowered to dispose of cases as Judicial Magistrates in summary trial. The violator of the Act shall be subject to a penalty of maximum two years of imprisonment of either description or a fine of maximum two thousand rupees or both.

The Orissa Reservation of Vacancies in Posts and Services (for SC and ST) Act, 1975 makes provision of reservation of posts for SCs (16.25%) and STs (22.50%) for initial appointments and promotions in State Government and other authorities under their control. The amended Section 4 of the Act reserves one third of posts in Class II, III and IV for women in direct recruitment from these scheduled categories.

The Orissa Resettlement and Rehabilitation Policy 2006 mentions inter alia under its Section-5(g), “Gram Sabha or Panchayats at the appropriate level shall be consulted in scheduled areas before initiating Land Acquisition Proposal”. However, there is no such provision under the concerned principal law i.e. Land Acquisition Act 1894. There is also no penalty provided in the above Policy against an authority who may be neglecting or bypassing the provision for consultation with Grama Sabha or Panchayats at appropriate level.

The Bonded Labour System Abolition Act, 1976 is a Central Act that aims at liberating and rehabilitating bonded labourers, who may belong to any tribe, caste or community including the STs. With a view to eradicating this social evil Govt. of India in the Ministry of Labour has been operating a centrally sponsored scheme for rehabilitation of freed bonded labourers since 1978. The State Government of Orissa through the District Magistrates, Sub-District Magistrate and other Officials identify, release and rehabilitate the bonded labourers. The Centrally sponsored scheme on bonded labour provides for financial assistance for the rehabilitation of bonded labourers as soon as they are identified and released. The expenditure is equally shared between Central and State Governments concerned on 50:50 basis.

The Orissa Protection of Scheduled Castes and Scheduled Tribes (Interest in Trees) Act, 1981 was notified in September 1983 and seeks to protect the interest in specified trees belonging to SCs and STs. If after the commencement of this Act a Contractor enters into a contract with an owner of any specified tree for the sale of the timber thereof and such owner is a member of the Scheduled Castes or the Scheduled Tribes and if the contract has been entered into without the previous permission in writing granted by the Range Officer, the said contract shall be invalid. A member of SC or ST who is an owner of a specified tree may also apply to the concerned DFO for cancellation of a Contract for sale of the timber of that tree to a contractor. A contractor who fells any specified tree belonging to a Member of SC or ST in pursuance of a Contract, shall on conviction be punished with rigorous imprisonment upto six months or a maximum fine upto rupees two thousand or with both.